



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 54 OF 2013

GREGORY MUTACHI WAMACHE.....PLAINTIFF

VERSUS

KWEYU OKUMU RAMADHAN

DON MAKHALI WA OPEMBE.....DEFENDANTS

JUDGEMENT

This is the application of Gregory Mutachi Wamachi for the determination of the following questions:

1. Whether the applicant has occupied land which is registered as South Wanga/Eluche/2265 for a period of 16 years and therefore acquired title to the same by adverse possession.
2. Whether land parcel number South Wanga/Eluche/2265 can be traced to land parcel number South Wanga/Eluche/401.
3. Whether title of Ramadhan Kweyu Okumu extinguished in or about the year 2009 and that he held land parcel number East Wanga/Eluche/2265 for Gregory Mutachi Wamache.
4. Whether Ramadhan Kweyu Okumu could pass good title to Don Makhali Wa Opembe on 31st July 2012 in respect of land parcel number East Wanga/2265.
5. Whether the plaintiff herein can be registered as proprietor of land parcel number East Wanga/Eluche/2265 as he has obtained title by adverse possession.
6. Who bears the costs of the case.

PW1 testified that his father bought the suit land from the 1st defendant's father. That land parcel number East Wanga/Eluche/2262 was subdivided from land parcel number East Wanga/Eluche/401 and is one acre which was sold to the applicant/plaintiff in 1997. He produced the agreement PEx1. It was in the 1st defendant's father's name at the material time. That the applicant has used the land for 15 years and then he placed a caution in 2012. They were cultivating the land. They had a case in Mumias Court in 2013 over the same matter PEx5 are the proceedings.

The 1st defendant/respondent stated that in 1997, the applicant was interested in one acre of land from Land Parcel No. East Wanga/Eluche/401 but failed to complete the purchase price. That while signing the agreement made on 12th August, 1997, it was agreed that the plaintiff would pay the purchase amount directly to St. Mary's Hospital to have his patient discharged and present the payment receipts to him which he failed to do. That he never ever allowed the applicant to take vacant possession of the suit land and it is therefore not true that the applicant has had quiet, continued, notorious and uninterrupted occupation of the sit land todate. That there has been several disputes between himself and the applicant which were handled at the Provincial Administration level whereby the applicant was asked not to lay claim on the suit land and indeed he abandoned his attempts to take possession thereof.

The 2nd defendant/respondent testified that one Ramadhan Kweyu Okumu, sued herein as the 1st defendant/respondent, approached him in the year 2012 with the intention of selling to him 1 acre of land from parcel L.R. No. East Wanga/Eluche/2265. That on the 3rd day of April 2012, he did obtain a certificate of search of the suit land which indicated that indeed 1st respondent was the registered owner. That being satisfied that the 1st respondent was the registered proprietor of the suit land, on the said 3rd day of April 2012, they executed an agreement for the purchase of 1 acre of land from the suit land for a total consideration of Kshs 250,000/= which consideration was completed in two installments DEx11. That as a result of their negotiations with the 1st respondent over the sale of the 1 acre, the 1st respondent had taken steps to obtain the consent of the relevant Land Control Board as can be seen from the application for consent and letter of consent marked

DEx 12. That on the 31st day of July 2012, he became the registered owner of the purchased 1 acre which was registered as East Wanga/Eluche/2622 and on the 21st day of September, 2012 he was issued with a title deed PEx 14. That before he purchased the 1 acre, he had visited the parcel of land and confirmed that the purchased 1 acre was vacant and unoccupied. That from the time he purchased the 1 acre, he has had exclusive use of the same, farming and constructing thereon and nobody has approached him complaining that he has trespassed upon their land.

This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

It is not in dispute that the registered owner of land parcel number East Wanga/Eluche/2262 is the 2nd defendant. The issue is whether or not he holds a good title by virtue of the plaintiff’s claim of adverse possession. Be that as it may, in determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Sergon J in the case of Gerald Muriithi v Wamugunda Muriuki & Another (2010) eKLR while referring to the case of Wambugu v Njuguna (1983) KLR page 172 the Court of Appeal held as follows;

1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.

3. Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant’s possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.

The court was also guided by the case of Francis Gicharu Kariri - v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of Kimani Ruchire -v - Swift Rutherfords & Co. Ltd. (1980) KLR 10 where Kneller J, held that:

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)”.

So the plaintiff must show that the defendant had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it. In applying these principles to the present case, the plaintiff testified that, his father bought the suit land from the 1st defendant. That land parcel number East Wanga/Eluche/2262 was subdivided from land parcel number East Wanga/Eluche/401 which is one acre and was sold to the

applicant/plaintiff in 1997. He produced the agreement PEx1. It was in the 1st defendant's father's name at the material time. That the applicant has used the land for 15 years and then the plaintiff placed a caution in 2012. They were cultivating the land. They had a case in Mumias Court in 2013 over the same matter PEx5 are the proceedings. The 1st defendant/respondent testified that in 1997, the plaintiff got interested in one acre of land from Land Parcel No. East Wanga/Eluche/401 but failed to complete the purchase price. He never took possession of the same. The 2nd defendant gave evidence that, he bought the suit land from the 1st defendant on 3rd day of April 2012, they executed an agreement for the purchase of 1 acre of land from the suit land for a total consideration of Kshs 250,000/= which consideration was completed in two installments DEx11. He produced the title DEx14, application for consent and consent DEx12 a & b. The 2nd defendant took possession and started utilizing the land to date. I find that the plaintiff has failed to prove that they were on the suit land for a period of over 12 years without interruption. Indeed it is not clear why they stopped using the land if they had taken possession in 1997. I find that from the time the 2nd defendant purchased the 1 acre, he has had exclusive use of the same, farming and constructing thereon. For these reasons, I find that the plaintiff has not been in exclusive, continuous and uninterrupted possession, occupation and open use of the said portions of land for a period in excess of 12 years from 1997 to 2012. I find that the plaintiff has failed to establish that his possession of the suit land was continuous and not broken for any temporary purposes or any endeavours to interrupt it for a period of 12 years. I find that the plaintiff has failed to establish his case on a balance of probabilities against the defendant and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17TH DECEMBER 2019.

N.A. MATHEKA

JUDGE